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No. 84-1278

In the Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE J. YAMASAKI, DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION, PETITIONER

v.

STOP H-3 ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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The question presented is whether the court of appeals overstepped the proper bounds of judicial review in setting aside the Secretary of Transportation's determination that, for purposes of Section 4(f) of the Department of Transportation Act, which regulates use of parkland for federally-supported highways, there was no prudent alternative to routing a stretch of Interstate Highway H-3 alongside Ho'omaluhia Park.[1]

[1]Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(c), provides in pertinent part:

> The Secretary [of Transportation] may approve a transportation * * * project requiring the use of publicly owned land of a public park * * * only if —
>
> (1) there is no prudent and feasible alternative to using that land * * *.

See also the essentially identical provisions of Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138.

1. This case concerns H-3, a proposed federal Interstate Highway System project intended to link the leeward and windward sides of the island of Oahu in Hawaii. As presently designed, the highway would run alongside Ho'omaluhia Park, land subject to the provisions of Section 4(f), for approximately 1.7 miles. Reversing the district court, the court of appeals enjoined further construction pending compliance by the United States Secretary of Transportation "with section 4(f) as the statute applies to Ho'omaluhia Park" (Pet. App. 46a).[2] The Ninth Circuit held (*id.* at 13a-23a) that the administrative record did not support the Secretary's rejection of the "Makai" (*i.e.*, "toward the ocean") alternative to use of the park as "imprudent" under the strictures of Section 4(f). Further the court of appeals stated (Pet. App. 23a-29a) that the Secretary's rejection of the "alternative" of not constructing the project at all was not justified by the record of the administrative decision.[3]

2. We share the petitioner's view that, in invalidating the Secretary's determination that there is no "prudent" alternative to routing H-3 adjacent to the Ho'omaluhia Park, the court of appeals may well have exceeded the permissible scope of judicial review of Section 4(f) decisions, as reflected in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971). While the Secretary's decision is subject to a "thorough, probing, in-depth review" (401 U.S. at 415), the reviewing court is not to substitute its judgment for that of the Secretary, and must confine its inquiry to

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[2]The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 740 F.2d 1442. The opinion of the district court (Pet. App. 55a-125a) is reported at 538 F. Supp. 149.

[3]Judge Wallace filed a separate concurring opinion (Pet. App. 47a-52a). He joined in the majority's holding except for the majority's "unnecessary analysis of the No Build alternative in connection with Ho'omaluhia Park," which he viewed as incorrect dictum (*id.* at 47a-48a).

whether the decisionmaker's choice was reasonably based upon the administrative record (*id.* at 415-420). We thus believe that there is a substantial basis for petitioner's contention (Pet. 14-18) that the court of appeals has blurred the line separating proper judicial review from interference with administrative discretion and informed decisionmaking.

This case, however, provides an inappropriate vehicle for exploring and clarifying the scope and standard of judicial review of Section 4(f) determinations. The court of appeals' decision does not preclude the Secretary from reinstating his Section 4(f) determination. It merely holds that the present administrative record does not suffice to support the previous determination, and accordingly requires appropriate supplementation. The court of appeals thus emphasized (Pet. App. 23a):

> We stress that we do not find, nor is it this Court's role to find, that the Makai Realignment is *in fact* a feasible and prudent alternative. We obviously do not possess the technical expertise of roadbuilders, and we should not interfere in the technical processes of building roads. At the same time, however, it remains our solemn responsibility to insure that those with technical expertise exercise it in accordance with the laws of the United States and the public welfare. * * * The record before us simply does not demonstrate that the stringent requirements of section 4(f), as defined in *Overton Park* and its progeny, have been satisfied. Until those requirements are satisfied, we cannot allow our Nation's sacred parklands to be taken or used.[4]

---

[4]In summarizing its disposition the court of appeals added (Pet. App. 29a):

> In conclusion, then, it is our view that the present record does not support a determination that the No Build alternative must be

Nor is there any reason to conclude that supplementation of the administrative record would prove a futile exercise here. The court of appeals' opinion specifically adverts to documentation that could be provided that would support what it considered to be unsubstantiated premises of the Secretary's 4(f) determination. See, *e.g.*, Pet. App. 21a-22a & n.19 (missing safety analysis of Makai alternative could readily be supplied); see also Pet. App. 27a-28a. In addition, the court of appeals declined to consider certain testimony and an affidavit pertinent to the justifiability of the Section 4(f) determination on the ground that the materials were not before the Secretary. Plainly that need not be the case in any reconsideration of the Section 4(f) determination. Thus, supplementation of the administrative record could well avert the need to clarify the scope of judicial review of Section 4(f) determinations. Accordingly, although the court of appeals' decision is inconsistent with the government's position below, we do not believe that further review is justified here.[5]

---

rejected as imprudent. We emphasize that, as with the Makai Realignment, we do not hold that the No Build alternative is, in fact, reasonable and prudent. We merely hold that the record before us does not demonstrate that the stringent requirements of section 4(f) have been satisfied.

[5]Petitioner now appears to contend (Pet. 13-14) that the location of Route H-3 alongside Ho'omaluhia Park is a factor that "the Secretary could properly consider in concluding that Section 4(f) is not applicable" here (Pet. 13). This argument, or a variant thereof, evidently was rejected by the district court and apparently was not raised by petitioner in the court of appeals (see Pet. App. 6a-7a n.5). In any event, the Secretary's 4(f) determination was premised on the assumption that Section 4(f) is applicable here. (The Secretary considered the special symbiotic relationship of Ho'omaluhia Park and Route H-3 as a factor bearing upon the merits of his Section 4(f) determination.) This is accordingly an inappropriate case in which to consider petitioner's contention that the Secretary might have dispensed with compliance with Section 4(f).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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OPPOSITION

BRIEF

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STOP H-3 ASSOCIATION, LIFE OF THE LAND, HUI MALAMA AINA O KO'OLAU,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF STOP H-3 ASSOCIATION, LIFE OF THE LAND AND HUI MALAMA AINA O KO'OLAU IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 4(f) of the Department of Transportation Act of 1966 and Section 18 of the Federal Aid Highway Act of 1966 prohibit the use of parklands by highways unless there is no feasible and prudent alternative to such use.

1. Do these statutes apply where the boundary of a proposed four lane freeway would be coterminous with that of a 450 acre wilderness park for over half the park's perimeter and the effects of the freeway would be direct and substantial even though no parkland will be physically taken?

2. Should the highway be exempted from the operation of these statutes where although the highway and park were conceived contemporaneously, the wilderness park has become a major, functioning reality and the highway has yet to be developed?

3. Can Petitioner raise for the first time in the Supreme Court a factually disputed issue concerning the applicability of these two statutes which Petitioner failed to appeal to the Circuit Court?

PARTIES TO THIS PROCEEDING

The State defendant below was Ryokichi Higashionna as Director of the State of Hawaii Department of Transportation. He has been succeeded as Director by Wayne J. Yamasaki who is the Petitioner in this proceeding.

The Federal defendants below were Elizabeth H. Dole as Secretary of the U.S. Dept. of Transportation and Ralph Segawa as Hawaii Division Engineer, Federal Highways Administration. Ralph Segawa has since died and his successor is Heloshi Kusumoto. The Federal defendants have neither filed a Petition for a Writ of Certiorari nor joined in the Petition of the State defendants. They are therefore also Respondents in this proceeding.

Respondents Stop H-3 Association, Life of the Land, and Hui Malama Aina O Ko'olau were plaintiffs in the District Court and appellants before the Ninth Circuit Court of Appeals.

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FEDERAL STATUTES:

Section 4(f) of the Department of Transportation Act of 1966, 92 Stat. 824, 49 U.S.C. § 1653(f) [recodified as § 303], and Section 18 of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. § 138 ..... *passim*

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Respondents Stop H-3 Association, Life of the Land and Hui Malama Aina O Ko'olau respectfully urge this Court not to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The majority and concurring[1] opinions of the Ninth Circuit Court of Appeals issued in 1984 are reported as

[1] In its Petition, the Petitioner repeatedly mischaracterized Judge Wallace's partial concurrence as a dissenting opinion.

Stop H-3 Ass'n v. Dole, 740 F.2d 1442. Those opinions are reprinted at pp. 1a-52a of the Appendix to the Petition. The 1982 decision of the U.S. District Court for the District of Hawaii from which the appeal was taken is reported as *Stop H-3 Ass'n v. Lewis*, 538 F.Supp. 149. That opinion is reprinted at pp. 55a to 125a of the Appendix to the Petition.[2]

JURISDICTION

The basis for jurisdiction in the District Court was 28 U.S.C. Sec. 1338(a). In the Ninth Circuit Court of Appeals jurisdiction was based on 28 U.S.C. Sec. 1291 and 1292(a) (1). The Ninth Circuit Court of Appeals Opinion was issued on August 21, 1984. Petitioner's Suggestion of Appropriateness of Rehearing En Banc was unanimously denied on November 15, 1984. Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4(f) of the Department of Transportation Act of 1966, as amended, 92 Stat. 824, 49 U.S.C. § 1653(f), and Section 18 of the Federal-Aid Highway Act of 1968, 82

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[2] Prior decisions in this litigation are *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976), *Stop H-3 Ass'n v. Brinegar*, 389 F.Supp. 1102 (D.Haw. 1974), *Stop H-3 Ass'n v. Volpe*, 353 F.Supp. 14 (D.Haw. 1972), and *Stop H-3 Ass'n v. Volpe*, 349 F.Supp. 1047 (D.Haw. 1972).

Stat. 823, 23 U S.C. § 138 are virtually identical.[3] These two statutes are commonly and hereinafter referred to as the "4(f) statutes" or "section 4(f)". They provide as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

———o———

[3] 23 USC Sec. 138 was amended in 1976 to add a sentence concerning highways to and through national parks. 49 U.S.C. § 1653(f) was recently recodified without substantive change as 49 U.S.C. § 303.

STATEMENT OF THE CASE

The City and County of Honolulu is a single political entity encompassing the entire island of Oahu. Geographically, the Ko'olau Mountain range runs roughly north-south and divides Oahu into the windward (east) and leeward (west) sides. The primary urban center (Waikiki, downtown, Pearl Harbor) is located in the southern third of leeward Oahu. Two bedroom suburbs, Kailua (Kai-loo-ah) and Kaneohe (Khan-e-o-hay), are located on windward Oahu, but most of windward Oahu is rural. The primary north-south highways are Kamehameha Highway on the windward side and Interstates H-1 and H-2 on the leeward side. These two north-south highways are connected by two east-west highways through the Ko'olau mountains. The Pali (Pah-lee) Highway connects the suburb of Kailua with downtown Honolulu. About four miles north of the Pali Highway, Likelike (Leeky-leeky) Highway roughly parallels the Pali Highway and connects Kaneohe with the airport area on the leeward side. Interstate H-3 would be a spur line off of H-1 and a third trans-Koolau highway.

In 1960, as part of its statehood package, Hawaii was allotted a share of the interstate highway system mileage. Part of the mileage alloted to Hawaii was used to build Interstate Highways H-1 and H-2. The State proposes to use the rest of its interstate mileage allotment for H-3.

As planned, H-3 would connect Kaneohe Marine Corps Air Station on windward Oahu with the Pearl Harbor/Halawa area on the leeward side. By sprinkling references to these and other military installations on

Oahu as well as by using the label "defense highway" at every opportunity, Petitioners suggest by innuendo what would be false if stated directly, i.e., that H-3 is actually needed as a defense highway. Such is not the case. In September, 1981, the Department of Defense prepared its *Interstate Completion Study* which has been annually updated. The study designates on a "yes" "no" basis whether planned but unbuilt interstate segments are of importance to national defense. H-3 is designated as a highway in the "no" defense importance category.[4] Since obviously Hawaii's Interstate mileage cannot connect to the interstate highway system, H-3 is labeled a "defense highway" to secure interstate funding as a component of the Interstate and Defense Highway System.

Petitioner suggests that the unbuilt part of H-3 is a "missing link". That is not the case. It is an offshoot of H-1. Halawa Interchange (the proposed leeward terminus of H-3) was built as part of H-1 not H-3. There is a short windward segment of H-3 that was completed in 1974 which terminates at Kamehameha Highway and needs only to be linked with that highway to have independent utility.[5] Precisely because that segment would have independent utility, Stop H-3 Ass'n. voluntarily exempted that section from the injunction issued in 1972 thereby allowing it to be completed with the understanding that the State would never contend that its completion

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[4] *See,* Congressional Budget Office Study, *The Interstate Highway System: Issues and Options,* Table C-1 at page 81 (Explanatary footnotes at page 94), June 1982.

[5] Respondents have always been willing to agree to such a connection but the State has declined to do so except on its terms in order to keep the completed segment out of use to generate public pressure for completing all of H-3.

justified or compelled further construction of H-3. Petitioners have now violated that understanding.

On windward Oahu at the base of the Ko'olau Mountains about midway between the Pali and Likelike Highways lies Ho'omaluhia (ho-o-mah-loo-hee-ah) Park. H-3 is proposed to be routed through a narrow strip of undeveloped land between Ho'omaluhia Park and the almost vertical windward cliffs of the Ko'olau Range. For 1.7 miles, about half of the Park's perimeter, the highway and park boundaries would be coterminus.

Ho'omaluhia Park did not come into existence because of H-3, nor as suggested by Petitioner was it created in any sense in response to H-3. Ho'omaluhia Park began independently as a Corps of Engineers flood control project in 1966.[6] The present windward alignment for H-3 was not finally determined until 1967. The park was developed independently of H-3, however, the existence of H-3 was forced upon the park planners as a "given" by the State of Hawaii, and as a result the park planners made no attempt to extend the Park's boundaries into the proposed H-3 alignment.

Ho'omaluhia in Hawaiian means "to make a place of peace and tranquility", and its development and use has been consistent with that theme. In what is essentially an undeveloped wilderness atmosphere the City has developed nature and environmental study facilities,

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[6] The dates used, the description of Ho'omaluhia Park and the quote from the Honolulu Parks Department which follow all are taken from the Ninth Circuit Court and the District Court opinions. *See, Stop H-3 Ass'n v. Dole,* 740 F.2d 1442 at 1447-48 (9th Cir. 1984) and *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149 at 176 (D.Haw. 1982) respectively.

camping and picnicking areas and equestrian and hiking trails. If H-3 were to be built it would be within 100, 200 and 700 feet of the three primary campgrounds, and for half its length the equestrian trail would be between 75 and 200 feet from the highway.

The Honolulu Parks Department describes Ho'omaluhia Park as follows:

> Ho'omaluhia is a program park, where all activities are directed toward the exploring, evaluating and appreciating of the natural environment and our interaction with it.
>
> Recreation at Ho'omaluhia will offer many ways to become involved in the environment, through nature walks, hiking, camping, picnicking, cloud watching and other programs to enhance environmental awareness.
>
> Variety is the key; and to ensure it, the wilderness atmosphere of quiet and solitude must be maintained.

The visual intrusion and the noise and air pollution from a major freeway immediately abutting the park would destroy the purpose for which the park was created and for which it has been operated.

This litigation has spanned 13 years. As it progressed the incumbent Secretary of Transportation has been substituted for his or her predecessor as the named Defendant. Although the Complaint has been amended from time to time and parties substituted, it remains the same case originally filed on July 19, 1972. At that time no environmental impact statement (EIS) had been prepared for H-3 as required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* (NEPA). Ignoring *Arlington Coalition v. Volpe,* 458 F.2d 1323 (4th Cir. 1972), *cert. denied,* 409 U.S. 1000 (1972) and a dozen

cases with similar holdings, the State took the position that H-3 was exempt from NEPA because the State had decided to build H-3 before NEPA was enacted. At the insistence of the U.S. Attorney's office the State reluctantly abandoned that position and stipulated to the entry of an injunction in September 1972 halting all construction work (except on the short windward section previously discussed) until an EIS could be prepared and approved. The stipulated injunction was extended by the District Court in October 1972 to prohibit all design and engineering work. *Stop H-3 Ass'n v. Volpe,* 349 F.Supp. 1047 (D.Haw. 1972). In 1973 the complaint was amended to add a claim that the 4(f) statutes applied to historic Moanalua Valley, a privately owned leeward valley through which the State then proposed to route H-3. Similar to the position it took with NEPA, the State denied that the 4(f) statutes applied to Moanalua Valley in spite of the fact that the Secretary of Interior had determined the valley to be eligible for inclusion on the National Register of Historic Places. In late 1974 the State obtained approval for the EIS and moved to dissolve the injunction. After trial, on Dec. 26, 1974 the District Court filed its opinion in which it agreed with the State's position on the applicability of the 4(f) statutes to Moanalua Valley and dissolved the injunction. *Stop H-3 Ass'n v. Brinegar,* 389 F.Supp. 1102 (D.Haw. 1974).

An injunction pending appeal was refused, however, the Ninth Circuit Court expedited the appeal and immediately following oral argument reinstated the injunction. In its Opinion filed on March 8, 1976, the Ninth Circuit Court reversed the District Court and found that the 4(f) statutes did apply to Moanalua Valley. The case was

remanded and the injunctions reinstated until the Secretary complied with the 4(f) statutes with respect to Moanalua Valley. *Stop H-3 Ass'n v. Coleman,* 533 F.2d 434 (9th Cir. 1976). A Suggestion for Rehearing En Banc was denied as was the State's Petition for Writ of Certiorari. 429 U.S. 999 (1976)

Only because it had been forced to do so, the State prepared a 4(f) statement for Moanalua Valley. True to form the 4(f) statement concluded that there were no feasible and prudent alternatives to H-3's use of Moanalua Valley. That conclusion was rejected by the Secretary of U.S. Dept. of Transportation (hereinafter referred to as the "Secretary") who formally determined that on the record he could not agree that there were no prudent alternatives to the use of Moanalua Valley. Only then did the State abandon the Moanalua Valley route and shift the proposed leeward alignment two valleys northward into North Halawa Valley.

Because construction, design, and engineering of H-3 has been continuously enjoined since October 1972 (except for brief periods in 1975 and 1983), H-3 still has progressed very little. However, by 1978 Ho'omaluhia Park was a reality, a 450 acre mountain park with a 32 acre lake. It was and is, by far, the major non-beach park on Oahu, and its status as a park of local significance is firmly established.

On July 3, 1978 Stop H-3 Ass'n. filed an amended and supplemented complaint which added as a supplemental claim allegations that the 4(f) statutes applied to Ho'omaluhia Park. Once again, the State's response was to deny that the 4(f) statutes were applicable. In 1978 the Dis-

trict Court denied the State's motion to dismiss that new supplemental claim. The Court found that the direct and substantial impact of H-3 on Ho'omaluhia Park constituted a constructive use of the Park and triggered the application of the 4(f) statutes.[7] Only after the Court denied the State's motion to dismiss and rejected the State's position on 4(f) did the State grudgingly prepare a 4(f) statement for Ho'omaluhia Park.

At trial in 1981 Stop H-3 Ass'n urged that if the tests enunciated in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971) (hereinafter cited as *Overton Park*) properly were applied, on the record the Secretary could not reasonably have concluded that two of the alternatives, the "Makai Realignment" and "No Build" alternatives, both of which would avoid all use of Ho'omaluhia Park, were imprudent. Although the District Court agreed that none of the reasons advanced in the 4(f) statement individually rendered those alternatives imprudent, the District Court felt that, if the reasons were amalgamated, the Secretary could have concluded that both of those alternatives were imprudent. *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149, 180 (D.Haw. 1982). Respondents appealed. An injunction pending appeal was denied but following oral argument on November 30, 1983 the Ninth Circuit Court reimposed the injunction.

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[7] It should be emphasized that the right of way at Ho'omaluhia Park had not yet been acquired for H-3. The U.S. Dept. of Transportation regulations themselves recognized that the 4(f) statutes applied to parks that were developed or determined to be significant later in the development of a highway where the right of way had not been acquired. 23 C.F.R. 771.19(e) (1979), 23 C.F.R. § 771.135(g) (1984).

On August 21, 1984, the Ninth Circuit Court issued its Opinion. "After a thorough, probing, and in-depth review of the administrative record, we agree with the appellants' contentions in respect to the 'Makai Realignment' alternative and the 'No Build' alternative, and, accordingly, we reverse."[8]

In his Petition, Petitioner attacks (1) the factual determination by the District Court that the freeway would constructively use Ho'omaluhia Park, (2) the well established doctrine that constructive use of a park triggers the application of the 4(f) statutes, and (3) the Ninth Circuit Court's holding that the record did not support the Secretary's finding that the two alternatives which would avoid all use of Ho'omauhia Park were not prudent.

REASONS FOR DENYING THE WRIT

I. This Case Arises Out of a Unique and Complex Set of Facts Never Likely to Be Duplicated.

It should be readily apparent from the foregoing Statement of the Case, that this litigation arises out of a very unique and complex set of facts and has a convoluted procedural history which is never likely to be encountered again. A review of the facts of every reported decision in which the 4(f) statutes have played a part reveals no similar factual situation or procedural history. It is unclear whether the Petitioner is urging the abolition of the

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[8] *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1449 (9th Cir. 1984) (footnote omitted).

constructive use doctrine[9] or that H-3 should be exempted from the 4(f) statutes because H-3 and the Park were conceived at about the same time and the planning for each acknowledged the potential existence of the other.[10] There seems to be little utility in this Court passing on an issue when either way the issue is decided it would only affect cases where park and highway planning start at about the same time, but the park is developed and becomes operational years before even the right of way is acquired for the highway. Petitioner would have the Court ignore the trial court's factual determination that the substantial, direct and adverse impacts on the park if H-3 were to be built would constitute a "use" of the park. If H-3 had been built before the Park, then the 4(f) statutes would not have applied to begin with. When the reverse situation is present the plain wording of the 4(f) statutes require that they be applied. Even though the Park is a present reality and the future of the highway is still in doubt, Petitioner wants it both ways and asks for an exemption for H-3 from the 4(f) statutes for no other reason than that the Park and highway planners acknowledged the existence of both projects. Petitioner cites no authority for his position which is on point, because there is none. The absence of authority to support Petitioner's position is no doubt a reflection of the unique set of facts presented by this case. The truth is that when

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9 This seems to be what the Petitioner is driving at in his first "Question Presented" and the discussion under the Petition's first "Reason for Granting the Writ."

10 Petitioner seems also to taking this position in his first "Question Presented", the first paragraph of the Petitioner's first "Reason for Granting the Writ" and in part C of Petitioner's "Statement of the Case".

the state selected the route for H-3 it ignored the 4(f) statutes. Now the State asks to be exempted from the consequences of its error.

II. The Decision by the Ninth Circuit Is in Accord with the Decisions of Every Court Which Has Passed on the Question of Constructive Use.

The doctrine of constructive use is based on a simple reality, " . . . a project which respects a park's territorial integrity may still, by means of noise, air pollution and general unsightliness, dissipate its aesthetic value, crush its wildlife, defoliate its vegetation, and 'take it' in every practical sense." *D.C. Federation of Civic Associations v. Volpe,* 459 F.2d 1231, 1239 (D.C.Cir. 1971) *cert. denied,* 405 U.S. 1030 (1972) (footnote omitted). The opening words of the 4(f) statutes themselves support a broad interpretation of the term "use". "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands. . ." Faced with this clear expression of Congressional intent[11] the Ninth Circuit as early as 1972 decided that "the word 'use' is to be construed broadly. . ." in 4(f) cases. *Brooks v. Volpe,* 460 F.2d 1193, 1194 (9th Cir. 1972). In that case, the Court required that the "encirclement of Denny Creek campground by the challenged freeway be recognized as a use of that campground" within the meaning of the 4(f) statutes.

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[11] It should be kept in mind that the identically worded statute was enacted not once, but *twice,* once in 1966 and again in 1968. Congress had a chance to decide if it really meant what it said the first time and decided that it did. The legislative history of the 4(f) statutes is discussed extensively in Gray, *Section 4(f) of the Department of Transportation Act,* 32 Md.L.Rev. 327 (1973).

Ten years later in *Adler v. Lewis,* 675 F.2d 1085, 1092 (9th Cir. 1982) the Ninth Circuit Court reaffirmed its prior holding:

> The term 'use' is to be construed broadly, not limited to the concept of a physical taking, but includes areas that are significantly, adversely affected by the project. Department of Transportation Order No. 5610.1A, para. 9(c)(1), 36 Fed.Reg. 23681 (1971). Even off-site activities are governed by § 4(f) if they could create sufficiently serious impacts that would substantially impair the value of the site in terms of its prior significance and enjoyment *D.C. Federation of Civic Associations v. Volpe,* 459 F.2d 1231, 1239 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972).

In constructive use cases it is plaintiff's burden to establish that the highway would significantly impair the uses for which the park was designed. *Citizen Advocates for Responsible Expansion v. Dole,* 586 F.Supp. 1094, 1103 (N.D. Tex. 1984). Respondents twice met that factual burden in the District Court. The District Court's conclusion that H-3 would constructively use the Park because of the significant impairment of the uses for which the Park was designed went unchallenged on appeal.

Even the cases cited by Petitioner acknowledge, accept, agree with, and apply the constructive use doctrine. In *Falls Road Impact Committee v. Dole,* 581 F.Supp. 678 (E.D. Wis. 1984) *aff'd* 737 F.2d 1476 (7th Cir. 1984), the court applied the constructive use doctrine and concluded that the use of the park was not significant enough to constitute a constructive taking. In reaching its decision the Court by specific reference made it clear that if it had been a case of a major freeway being built next to a park, its decision might have been different. *Id.,* 581 F.Supp. at

693. Likewise, in *Arkansas Community Org, for Reform Now (A.C.O.R.N.) v. Brinegar,* 398 F.Supp. 685 (E.D.Ark. 1975), *aff'd, A.C.O.R.N. v. Coleman,* 531 F.2d 864 (8th Cir. 1976) upon which Petitioner relies heavily, the Court specifically acknowledged *and applied* the constructive use doctrine. "If the park is a public park, it simply cannot be used actually or *constructively* for federal highway purposes until a proper statutory finding has been made." *A.C.O.R.N. v. Brinegar,* 398 F.Supp. at 692 (emphasis added). In *A.C.O.R.N.,* on the facts the Court found that because the park was an urban park bounded by heavily trafficked streets and containing a theater, restaurant, museum and art center, the increase in noise and air pollution would not substantially affect park users, and therefore there was no constructive use. In this regard the Court's approach in A.C.O.R.N. is in complete accord with that used by the Hawaii District Court.

"Constructive use is not an easily defined concept. The fact that traffic noise can be heard or that a highway can be seen from a park does not necessarily mean that the park is being 'used' by the highway. The degree or existence of constructive use depends upon both the nature of the park and the degree of impacts from the highway." *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149, 176-77 (D.Haw. 1982). From the just quoted language, it is clear that the Hawaii District Court understands that the impacts of the highway have to be substantial to constitute constructive use. It had the same understanding when it entered its Order on Nov. 21, 1978 finding that the substantial impacts of H-3 on Ho'omaluhia Park were ". . . sufficient to make the 'constructive use' doctrine of *Brooks v. Volpe,* 460 F.2d 1193 (9th Cir. 1972) applicable. . ." Such constructive use,

the Court went on to hold, triggered the application of the 4(f) statutes. *Citizens to Preserve Wilderness Park v. Adams,* 543 F.Supp. 21 (D.Neb. 1981), *aff'd.* 685 F.2d 438 (8th Cir. 1982), another case relied on by Petitioner, illustrates that the use of the constructive use doctrine is a two way street. There the Court upheld the Secretary's determination that there were no prudent alternatives because all alternatives involved park use. It did so by pointing out that the one alternative which would not physically take parklands nevertheless would impact on the park sufficiently to constitute constructive use.

It is serious misreading of *Nashvillians Against I-440 v. Lewis,* 524 F.Supp. 962 (D.Tenn. 1981) for Petitioner to suggest that the Court . . . "found that there is no such thing as constructive use." (Petition p. 14). On the contrary, the District Court stated that it personally was unconvinced that section 4(f) supported a constructive use theory *as applied to urban historic properties.* Nevertheless the Court indicated that as to one such property (Granny White Pike), there might be an obligation to prepare a 4(f) statement. Moreover that Court went on to say: "Most of the cases cited by plaintiffs in support of the 'constructive use' theory deal with parks and recreation areas or wilderness areas, rather than historic properties. (Footnote omitted). In those cases, the purposes for which such properties are protected were threatened by the 'use.'" *Id.,* 524 F.Supp. at 976. It was precisely because H-3 threatens the purposes for which Ho'omaluhia Park was created that both the District Court and the Ninth Circuit Court found such threatened injury to be constructive use. Whether or not the two projects were conceived contemporaneously is irrelevant.

There are numerous cases involving freeways next to parks which are directly on point. In *Citizens for Mass Transit Against Freeways v. Brinegar,* 357 F.Supp. 1269, 1280 (D.Ariz. 1973) the court stated: "The fact that the remainder of Barney Park is immediately adjacent to the freeway route is enough to require a 4(f) statement. . . ." Also on point is *Monroe County Conservation Council v. Adams,* 566 F.2d 419 (2nd Cir. 1977), *cert. denied* 435 U.S. 1006 (1977), where the Court found that the impact of a major freeway adjacent to a park was so great that it constituted a use under the 4(f) statutes. *Id.,* 566 F.2d at 424. Similarly in *Conservation Society v. Secretary of Transportation,* 362 F.Supp. 627 (D.Vt. 1973) *aff'd* 508 F.2d 927 (2d Cir. 1974), the Court found that a four lane highway project bordering on a wilderness area ". . . would constitute the 'use' of that land within the prohibitory meaning of § 4(f) . . ." *Id.,* 362 F.Supp. at 639.

The cases cited above are by no means an exhaustive listing of the cases which have acknowledged and applied the constructive use doctrine over the last decade and a half. There are no cases to the contrary. There is no conflict between any Circuit or District Courts.

Moreover, the constructive use doctrine works. It serves the obviously protective objects of the 4(f) statutes. It is not a rigid doctrine which has unnecessarily hampered highway development. But where, as here, Plaintiffs have proved that (1) the park is a publicly owned park of local importance and (2) the adverse effect of the highway on the park will be substantial, then there is no policy or practical reason why the park should not receive the protection of the 4(f) statutes. If Petitioner's interpretation were to be accepted, the full protection of the 4(f)

statutes would be applied to a park if a proposed highway would encroach some fraction of an inch into the park while it would not be applied if the highway and park boundaries were to be coterminous, as is the case here. Except for the absence of the actual taking of a small amount of land, the noise, visual impact, air pollution and other impacts of the freeway on the park would be identical. Obtaining two radically different results where the injury is almost identical is contrary to the remedial and protective purposes of the 4(f) statutes. For this reason every court that has addressed the question has recognized the reality that the actual taking of park land is only one component of what constitutes a use of park land.

Normally, Certiorari is granted only in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeals. *NLRB v. Pittsburgh S.S. Co.,* 340 U.S. 498 (1951). *See also General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175 (1938), *adhered to,* 305 U.S. 124 (1938), *reh. den.* 305 U.S. 675 (1939). In the case of the constructive use doctrine there is not only no real or embarrassing conflict of authority between Circuit Courts, there is *NO* conflict at all!

III. The 4(f) Statutes Are Completely Dissimilar in Intent and Operation from the National Environmental Policy Act.

In an apparent effort to jump on the bandwagon of what Petitioner misperceives to be a trend against strict enforcement of environmental statutes, the Petitioner complains that the Ninth Circuit Court's decision subjects ". . . a Federally-funded undertaking to the type of excessive and unfounded requirements that this court has re-

peatedly disavowed."[12] Petitioner then states: "Only two terms ago, this Court stressed the limited judicial role in assessing administrative agency compliance with environmental statutes, concluding that the role was of necessity a limited one in deference to the expertise of administrative agencies. . ."[13]

NOT ONE of the five cases cited by Petitioner in support of these contentions has anything to do with the 4(f) statutes. They are all NEPA cases dealing with environmental impact statements. Neither the law nor the facts relevant to those cases has even a remote connection to the 4(f) statutes or to the questions presented by the Petitioner. In *Weinberger v. Catholic Action of Hawaii,* 454 U.S. 139 (1981) this Court rejected a Court-created requirement that a "hypothetical" EIS be prepared for nuclear storage facilities. In *Strycker's Bay Neighborhood Council Inc. v. Karlen,* 444 U.S. 223 (1980), this Court reaffirmed that the purpose of an EIS is to provide the public and the decisionmaker with accurate information on the environmental consequences of a proposed action but not to require that environmental concerns be elevated over other considerations by the decisionmaker. By contrast, the 4(f) statutes require that protecting parks from use by highways *must* be elevated over other considerations. *Strycker's Bay* re-

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[12] Citing *Weinberger v. Catholic Action of Hawaii,* 454 U.S. 139 (1981), *Stryker's Bay Neighborhood Council v. Karlen,* 444 U.S. 223 (1980), *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1978).

[13] Citing *Baltimore Gas and Electric Co. v. NRDC,* — U.S. —, 103 S.Ct. 2246 (1983), *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766 (1983).

affirmed *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1978), NEPA's ". . . mandate to the agencies is essentially procedural." *Id.,* 435 U.S. at 558. In *Baltimore Gas and Electric Co. v. NRDC,* — U.S. —, 103 S. Ct. 2246 (1983), this Court held that in NEPA cases the Court's role is limited to ensuring that the agency adequately considered and disclosed the environmental impacts of its actions. Finally, in *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766 (1983), this Court rejected the lower Court's imposition of a requirement that an EIS examine the psychological effects on the population of the start up of the Three Mile Island nuclear reactor. These are all good, solid NEPA cases. Unfortunately for Petitioner, NEPA has nothing to do with the case at hand.

Unlike NEPA the 4(f) statutes are not "essentially procedural." On the contrary, "These [4(f)] statutes *prohibit* the Secretary of Transportation from authorizing the use of Federal funds to finance the construction of highways through public parks if a 'feasible and prudent' alternative route exists." *Overton Park,* 401 U.S. at 405 (emphasis added, footnote omitted). The language of the statute is unambiguous: ". . . the Secretary *'SHALL NOT APPROVE* any . . . project' that requires the use of any public parkland, 'unless (1) there is no feasible and prudent alternative to the use of such land. . . .'" *Overton Park,* 401 U.S. at 411 (emphasis added). The language of the 4(f) statutes ". . . *is a plain and explicit bar* to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted." *Id.* (emphasis added). The preparation of a 4(f) statement, unlike an EIS, is not a statutory requirement. It is device created by regulations of

the U.S. Department of Transportation to assist the Secretary in determining whether alternatives which would avoid park use are feasible and prudent. However, the preparation of a 4(f) statement is not simply an exercise in gathering accurate information to be used in making a discretionary choice. Rather, the information once gathered must demonstrate, to a fairly high degree of certainty, that there really is no choice except to actually or constructively use park lands for a highway. If all a 4(f) statement does is rationalize the highway authority's preferred choice, then the 4(f) statement is inadequate and the choice cannot be sustained. Unlike NEPA where the object is to gather information to assist the decisionmaker in exercising his discretion, the 4(f) statutes allow almost no discretion. "In other words, a road must not take parkland, unless a prudent person, concerned with the quality of the human environment, is convinced that there is no way to avoid doing so. *Monroe County Conservation Council, Inc. v. Volpe,* 472 F.2d 693, 700 (2nd Cir. 1972) (footnote omitted). The Fifth Circuit Court of Appeals put it even more succinctly, ". . . if there is another way, take it." *Louisiana Environmental Society Inc. v. Coleman,* 537 F.2d 79, 84 (5th Cir. 1976).

Because of the vast dissimilarity between NEPA and the 4(f) statutes, Petitioner's citation to authority interpreting NEPA is simply irrelevant. Petitioner is trying to jump on a bandwagon going in the wrong direction.

IV. The Petitioner May Not for the First Time in the Petition Ask This Court to Resolve Factually Disputed Issues Not Appealed to the Circuit Court.

On July 3, 1978 Respondents amended their complaint to add a new supplemental claim asserting that the 4(f)

statutes applied to Ho'omaluhia Park. On July 11, 1978 the State filed a "Motion to Dismiss or in the Alternative for Partial Summary Judgment" as to that claim. In its motion the State took the position that the 4(f) statutes did not apply to Ho'omaluhia Park because of the contemporaneous planning for H-3 and the Park. That motion was denied by an Order filed on Nov. 21, 1978 by the District Court in which the Court held:

> Although the proposed route of H-3 will not pass through the Ho'omaluhia Recreational Project, the highway's proximity to the recreational project is sufficient to make the 'constructive use' doctrine of *Brooks v. Volpe,* 460 F.2d 1193 (9th Cir. 1972) applicable here. Thus it is my opinion that the constructive use of Ho'omaluhia Project by H-3 triggers the 4(f) requirement in this instance.

No Federal Rules of Civil Procedure Rule 54(b) certification was sought, and no appeal was taken from that order. In reaching its decision the District Court necessarily found that the impact of the highway on the park would be so immediate, direct and substantial that such impact constituted a constructive use of Ho'omaluhia Park. The District Court was well aware that "[t]he degree or existence of constructive use depends both upon the nature of the park and the degree of impacts from the highway." *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149, 177 (1982). Prior to trial in 1982, the State filed a "Motion to Reconsider" asking the District Court to reconsider its 1978 Order. In its opinion filed on April 8, 1982 the Court reiterated its earlier ruling and denied the motion:

> Defendants contend that since the park boundaries were determined after the freeway alignment was established, the protections of 4(f) should not apply.
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> While Defendants' arguments are intuitively appealing, their position is contrary to the explicit statutory mandate that the Secretary may not approve *any* program or project which requires the use of parkland unless the provisions of the 4(f) statutes are complied with.
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> *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149, 176 (D. Haw. 1982)

Stop H-3 Ass'n appealed the 1982 District Court decision on very narrow grounds, none of which dealt with the District Court's 1978 Order or with the District Courts' denial of the State's Motion to Reconsider. The Ninth Circuit Court of Appeals pointedly noted that the State took no appeal on the 1978 Order.[14] Having failed to appeal the District Court's factual determination that the effects of the highway on the Park would be so substantial that they constituted a constructive use of Ho'omaluhia Park, Petitioners cannot do so now for the first time. Although this Court has in exceptional circumstances, especially in criminal cases, considered issues of law not passed upon by the Court of Appeals.[15] none of those special circumstances are present here and the issue turns on unappealed factual determinations.

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[14] *Stop H-3 Ass'n v. Dole,* 740 F.2d 1442, 1447-1448 n.5 (9th Cir. 1984).

[15] See, *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, 214 (1951); *U.S. v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 239 (1940); *U.S. v. Atkinson,* 297 U.S. 157 (1936).

V. It Is Clear That the Ninth Circuit Court Judges Did Not Substitute Their Judgment for That of the Secretary of Transportation.

Petitioner erroneously contends that the Ninth Circuit Court Judges substituted their judgment for that of the Secretary. The proper role for an appellate Court in 4(f) cases was clearly stated by this Court in *Overton Park*. In that decision this Court made it clear that the 4(f) statutes are " . . . clear and specific directives." *Overton Park,* 401 U.S. at 411. "This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted." *Id.* Feasibility depends only on determining whether an alternative can be built as a matter of sound engineering, and prudence is not to be determined by the Secretary engaging in a wide ranging balancing of competing interests. *Id.* The Secretary may *NOT* " . . . weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be 'prudent' . . . " *Id.* Although these factors are not to be ignored it is obvious that it always will be cheaper, less disruptive and possibly safer (because the route would be more direct) to use parkland for a highway. If considerations of cost, social disruption and safety considerations were controlling, there would be no need for the 4(f) statutes in the first place. *Overton Park,* 401 U.S. at 411-412. " . . . the very existence of the statutes indicates that protection of parklands was to be given paramount importance." *Overton Park,* 401 U.S. at 412-413 (footnote omitted). If the Secretary were permitted to

decide on a subjective basis what level of cost or amount of social disruption rendered an alternative imprudent then the application of the 4(f) statutes would essentially be in the unfettered discretion of the Secretary. It was precisely to make clear the limited range of discretion available to the Secretary that this Court stated that before considerations of cost or social disruption render an alternative route which would avoid park use imprudent those factors must reach extraordinary magnitudes, and in order for safety to render an alternative imprudent, the alternative route must present unique safety problems. *Overton Park,* 401 U.S. at 413. This leaves only a very small range of choices that the Secretary can make. *Overton Park,* 401 U.S. at 416.

With this guidance as to the proper interpretation of the 4(f) statutes, there were two questions the Ninth Circuit Court had to consider in this case. First, did the Secretary act within the scope of his authority. In order to answer that question the Ninth Circuit Court had to determine if, *on the record,* the Secretary's decision could reasonably be said to have been within the small range of choices which Congress specified and whether the Secretary could have reasonably believed, *on the record before him,* that all of the alternatives which would avoid the use of Ho'omaluhia Park were imprudent. *Overton Park,* 401 U.S. at 416. Once past these considerations the Administrative Procedure Act, 5 U.S.C. § 706(2) (A) (1964 ed., Supp.V) required that the decision actually made by the Secretary not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . ." *Overton Park,* 401 U.S. at 414. The second question the Ninth Circuit Court was required to consider was whether the

Secretary's decision was based on a consideration of the relevant facts and whether there was a clear error of judgment. *Overton Park,* 401 U.S. at 416. In that regard, " . . . the generally applicable standards of [the Administrative Procedure Act] *require* the reviewing court to engage in a substantial inquiry [and although] the Secretary's decision is entitled to a presumption of regularity . . . that presumption is not to shield his action from a thorough probing in-depth review." *Overton Park,* 401 U.S. at 415 (emphasis added).

In reaching its decision, the Ninth Circuit Court went straight to *Overton Park* for guidance, and in its opinion the Court set out the standard of review in strict conformity with the *Overton Park* decision. *Stop H-3 v. Dole,* 740 F.2d 1442, 1449 (9th Cir. 1984). The Ninth Circuit Court examined the full administrative record, to determine whether the record showed a sufficient basis for the Secretary's decision that every alternative which would avoid the use of Ho'omaluhia Park was imprudent. In conducting its review the Court gave the Secretary's decision the required presumption of regularity but recognized that the Secretary's decision had to be justified on the grounds invoked by the Secretary. *Stop H-3 Ass'n v. Dole,* 740 F.2d at 1450, citing *Securities & Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 196 (1947). The grounds invoked by the Secretary as the basis for finding the "Makai Realignment" and "No Build" alternatives to be imprudent were then exhaustively compared against the record. In short, the Ninth Circuit Court engaged in " . . . a thorough, probing, and in-depth review of the administrative record. . ." *Stop H-3 Ass'n v. Dole,* 740 F.2d at 1449-1458 and concluded that THE PRESENT RECORD

did not support the Secretary's determination that both of the alternatives which would avoid all use of Ho'omaluhia Park were imprudent. *Stop H-3 Ass'n v. Dole,* 740 F.2d at 1458.

At no point in the process did the Court substitute its judgment for that of the Secretary.

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CONCLUSION

Petitioner would have this Court reject the doctrine of constructive use and its application to the facts of this case. For fifteen years that doctrine has been well understood, accepted and beneficially applied by the courts. None of the Circuit Courts are in conflict with respect to the constructive use doctrine. This Court would be required to delve into a unique and complex factual and procedural history which necessarily would limit the applicability of the Court's decision to a narrow range of factual situations. Petitioner has cited to no authority which supports his contentions, because there is none. Nor can the Petitioner overcome his failure to appeal any part of the District Court's decision. Finally one need only to read the Ninth Circuit Court's scholarly and careful opinion to realize that the Court did precisely what it was required to do by *Overton Park.* The Ninth Circuit Court applied the correct standard of review, examined the whole record and found that the reasons advanced by the Secretary to support his finding of imprudence were not "unique problems", "truly unusual factors" nor did those problems

discussed in those reasons reach "extraordinary magnitudes" as required by *Overton Park*. The Court properly and correctly reached the right result. There being no error, the Petition should be denied.

Respectfully submitted,

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On October 16, 1984, Respondents declined the request of Pacific Legal Foundation to consent to its filing brief of an *amicus curiae* on *inter alia*, the following grounds: the parties to this action have been litigating this case for twelve years, and counsel for the State Petitioner are quite capable of adequately representing the Petitioner's position. In its Brief Amicus Curiae, Pacific Legal Foundation has presented new issues outside of the scope of the questions set forth by Petitioner in his Petition. Respondents believe the Pacific Legal Foundation's presence would obscure the issues rather than clarify them for the Court and oppose its motion to participate as *amicus curiae*.